

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MICHAEL ARMSTEAD,
Plaintiff,
v.
BEST BUY STORES, L.P.,
Defendant.

No. CV-06-118-FVS

ORDER

BEFORE THE COURT is Defendant's Motion to Dismiss (Ct. Rec. 7), Plaintiff's Motion to Amend/Correct Complaint (Ct. Rec. 22), and Plaintiff's Motion for Entry of Default (Ct. Rec. 23). Plaintiff Michael Armstead is represented by J. Scott Miller. Defendant Best Buy is represented by David Martinez, Rebecka Biejo, Roman Silberfeld and Thomas McLane.

BACKGROUND

Plaintiff filed his Complaint in this action in Spokane County Superior Court on March 28, 2006. The Complaint asserts causes of action under Washington's Law Against Discrimination, RCW 49.60, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Defendant removed the action to federal court on April 24, 2006, pursuant to 28 U.S.C. § 1441(b). This Court has original jurisdiction over this action under 28 U.S.C. § 1331 because Plaintiff asserts a claim for relief under Title VII. The Court has supplemental jurisdiction over Plaintiff's pendant state law claims pursuant to 28 U.S.C. § 1367(a).

1 On April 28, 2006, Defendant filed a motion to dismiss
2 Plaintiff's Complaint pursuant to Fed.R.Civ.P. 12(b)(6) and (f). On
3 May 9, 2006, Plaintiff filed a stipulated motion asking the Court to
4 amend/correct the caption in this matter to correctly identify the
5 Defendant as Best Buy Stores, L.P., instead of Best Buy Company, Inc.
6 The Court granted the stipulated motion and the caption in this matter
7 was changed in the electronic filing system. On the same day,
8 Plaintiff filed a motion to amend his complaint pursuant to
9 Fed.R.Civ.P. 15(a) and a motion for default. The proposed First
10 Amended Complaint asserts additional factual allegations as well as
11 additional claims for assault, intentional infliction of emotional
12 distress, negligence, hostile work environment, retaliation, and
13 vicarious liability. The Plaintiff's original Complaint and proposed
14 First Amended Complaint both request the Court certify this as a class
15 action.

16 **DISCUSSION**

17 Pursuant to Local Rule 7.1(h)(3), the Court exercises its
18 discretion and concludes, after reviewing the parties briefing, that
19 these motions are suitable for determination without oral argument.

20 ***Motion for Default***

21 Plaintiff moves for default on the basis that Defendant failed to
22 file an Answer to Plaintiff's Complaint within the twenty (20) days
23 required by Fed.R.Civ.P. 12(a). Although the Defendant has not filed
24 an Answer, it filed a motion to dismiss under Fed.R.Civ.P. 12(b)(6)
25 and (f). The Rule 12(b) motion extends the Defendant's time to file a
26 responsive pleading to Plaintiff's Complaint until 10 days after

1 notice of the Court's ruling on the Defendant's motion to dismiss.
2 See Fed.R.Civ.P. 12(a). Accordingly, Plaintiff's motion for default
3 is denied.

4 ***Motion to Amend Complaint***

5 Under Rule 15(a), "[a] party may amend the party's pleading once
6 as a matter of course at any time before a responsive pleading is
7 served." Fed.R.Civ.P. 15(a). "A motion to dismiss under Rule 12 is
8 not a 'responsive pleading' within the meaning of Rule 15." *Crum v.*
9 *Circus Circus Enters.*, 231 F.3d 1129, 1130 n. 3 (9th Cir. 2000); see
10 also *Morrison v. Mahoney*, 399 F.3d 1042, 1047 (9th Cir. 2005). Thus,
11 where a motion to dismiss is filed instead of an answer, Rule 15
12 allows a plaintiff to amend his original complaint once as a matter of
13 course without the need of obtaining leave of the court. An "amended
14 complaint supersedes the original, the latter being treated thereafter
15 as being non-existent." *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474
16 (9th Cir. 1997).

17 Here, Defendant has not filed an answer, but instead filed a Rule
18 12(b) motion to dismiss. As no prior amendment to the original
19 complaint has been filed¹, Plaintiff is entitled to amend his
20 complaint once as a matter of right under Rule 15(a). The amended
21

22 ¹ The Stipulated Motion to Amend Caption (Ct. Rec. 13) in
23 this matter does not function as Plaintiff's "one" chance to
24 amend his complaint without leave of the Court. Plaintiff's
25 stipulated motion specifically asked the Court to correct the
26 "caption" in this matter but never requested permission to file
an amended complaint to reflect the name change. Further, no
amended complaint reflecting the change in Defendant's name has
been filed.

1 complaint supersedes the original complaint in its entirety. Since
2 Defendant's Rule 12(b) motion to dismiss attacks the original and now
3 "non-existent" complaint, Defendant's motion to dismiss is now moot.
4 Accordingly,

5 **IT IS HEREBY ORDERED:**

6 1. Plaintiff's Motion for Entry of Default (**Ct. Rec. 23**) is
7 **DENIED.**

8 2. Defendant's Motion to Dismiss (**Ct. Rec. 7**) is **MOOT.**

9 3. Plaintiff's Motion to Amend / Correct Complaint (**Ct. Rec. 22**)
10 is **GRANTED.**

11 4. The **June 1, 2006, hearing** on these matters is **STRICKEN.**

12 **IT IS SO ORDERED.** The District Court Executive is hereby
13 directed to enter this Order and furnish copies to counsel.

14 **DATED** this 22nd day of May, 2006.

15
16 s/ Fred Van Sickle
Fred Van Sickle
United States District Judge
17
18
19
20
21
22
23
24
25
26